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Supreme Court of the United States

October Term, 1951

No. 3

JOHN KEDROFF and BENJAMIN FEDCHENKOFF as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY BRIEF OF APPELLANTS

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October Term, 1951

No. 44

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY BRIEF OF APPELLANTS

(Unless otherwise indicated numbers in parentheses refer to pages of the printed Record filed in this Court.)

The mass of detail which apepllee has accumulated in its massive brief should not be permitted to obscure the essential facts which are set forth in appellants' brief and which are in no way challenged, except with respect to the origin of St. Nicholas Cathedral, and here appellee is wholly in error as the record shows.

1. Origin of the Cathedral

The indisputable facts are that the land on which the edifice is built was acquired in 1899, the building was built in 1903, and was consecrated as a cathedral in 1905, and that the Church in Russia and the Russian Government supplied over $150,000 to build the Cathedral and contributed additional sums for its maintenance (164, 13, 14). Archbishop Leonty, appellee's witness, also testified that

"large sums of mony were sent by the Russian Church and Russian Government from Russia to acquire the land and build the cathedral" (14) and that he was "told" that "some money was raised in New York for the cathedral" (13). He also said (8):

> "Q. Well, would you tell his Honor briefly the history of the church and the Cathedral? A. The parish of Russian Orthodox Church in New York starts in 1893 as brotherhood and a small group, asking to build a church and have regular services. And after a while they collect money and start the bu...ing on the same place as Saint Nicholas Cathedral is now, about 1905. They started in 1903, and the church was consecrated in 1905, and was a parish church at that time. After transferring the Cathedral Episcopal from San Francisco to New York, Saint Nicholas Cathedral started as a Cathedral of Russia."

Appellee grossly perverts this testimony which in no way justifies its assertions that this brotherhood collected money "abroad", that the church in Russia and the Russian Government contributed substantial sums to it, that the Russian Ambassador and Consul General incorporated this parish brotherhood as the corporation which took title to the cathedral and that the cathedral was "acquired, built and consecrated a... a parish church" (its brief, p. 17). To what use the premises were put *prior* to the consecration of the cathedral in 1905 is of no consequence.

St. Nicholas Church became a cathedral, not by the will or vote of the clergy or worshippers of the diocese—they had no voice in the matter at all—but by the sacrament of consecration, performed by an accredited bishop by direction of Higher Authority. By virtue of this consecration, the catherdal was not dedicated to the worshippers of any parish or of the diocese but, under canon law, was reserved for the exclusive use of the appointed archbishop and it is undisputed that its occupancy or use by any other person would be a breach of canon law. It was the Patriarch and

not the worshippers who determined who was to be the archbishop and who was to occupy the cathedral. Even the *temporalities* of the cathedral were under the management of the archbishop and his Consistry, always subject "to the superior control of the Most Holy Synod at Petrograd, Russia" (235, 233). The assertion of appellee that the "beneficiaries" of the cathedral were the parishoners and then "automatically widened" to include all the worshippers of the diocese (its brief, pp. 55-6) is wholly arbitrary and is at variance with the facts and canon law.[1] The reference in the memorandum of the canonical experts of the metropolitan district to "St. Nicholas Cathedral in San Francisco, under the jurisdiction of Metropolitan Benjamin and through him the Moscow Patriarchate" (245) is equally applicable to St. Nicholas Cathedral in New York.

2. The Statute as it is

Under Article XV (secs. 290-295) and section 15 (subd. 3) of Article 2 of the Religious Corporations Law, passed in 1943, it was doubtful if a church affiliated with the metropolitan district, could incorporate without the approving certificate of the Federated Primary Orthodox Jurisdictions, and since the Patriarch's authorized archbishop was a member of this Federation, it was hardly likely that such certificate would be forthcoming. To remove this disability Article 5-C was passed, and it merely enabled churches of the metropolitan district to incorporate and thereafter to be governed by their own elected archbishop, without refer-

[1] Even so, the worshippers of the diocese, adhering to the Patriarch, even though they may be in the minority, may not be disregarded. This is not a matter for decision by a majority vote of the "beneficiaries". We are dealing with an hierarchal not a congregational church. The canon law controls, *i.e.*, the cathedral is subject to the jurisdiction of the Patriarch and his archbishop has the exclusive right to occupy it.

ence to the Primary Orthodox Jurisdictions. The 1945 statute does not operate as a transfer of patriarchal churches to the metropolitan district any more than the 1943 statute has the reverse effect. The construction by the majority below destroys the Federated Primary Orthodox Jurisdictions and repeals, by implication, the 1943 statute.

3. The Statute as Misread Below

Appellee concedes that the "compulsory mandate of the act applies only to religious corporations" established *prior* to 1924 [2] (its brief, p. 100). But if the Patriarch is a tool of the Soviet Government and the basic justification of the statute is the "likelihood" that the local churches might be used for Soviet propaganda (its brief, pp. 76, 77), why suppress only *incorporated* churches established *prior* to 1924 and spare all the rest, which may constitute the vast majority?

4. The Patriarchal Church

The Patriarchal Church survived every attempt of the Soviet government to destroy it. The full restoration of the patriarchal power and its canonical correctness cannot be questioned. The Appellate Division found that the metropolitan district itself recognized the Sobor of 1945 as authentic, negotiated with the Patriarchate for reunion and accepted the canonicity and reality of that church (276 App. Div. at 319). It is the only representative of all the Orthodox believers in the Soviet Union. That church is in full communion with all Eastern Churches and is in close association with the Anglican Church; indeed there have been discussions for a possible union between them. In 1948 the Patriarchal Church celebrated the 500th anniversary of its autocephaly at a conference in which the Eastern

[2] In such case, the statute also offends the guaranty of the equal protection of the laws.

Churches participated and where the representative of the Patriarch of Constantinople saluted the Russian Church and its Patriarch in terms of affection, referred to the "cordial ties" between the two churches, recalled that when the Russian church "had received, by divine grace, its autonomy, the Ecumenical Church of Constantinople sent to it * * * its wishes, full of blessing, on the occasion of that happy event" and joyfully participated in the decision of the Russian Church to celebrate the 500th year of its autocephaly. (Proceedings of the Conference, July 8-18, 1948, published in France in 1950, Volume I, pp. 17-18).[3]

In a study of the Soviet Union, published by the University of Notre Dame, and edited by Professor Gurian, Professor N. S. Timasheff of Fordham University, has a chapter on "Religion in Russia, 1941-1950" which, although critical in many respects, reveals the growth and power of the Patriarchate, which, considering its ordeals, is "almost incredible, perhaps miraculous" (p. 167).

5. The Cathedral and "Administrative Autonomy"

Appellee stresses the fact that the metropolitan district asserted merely "administrative autonomy" and not ecclesiastical independence (brief, pp. 81-83). The 1948 Amendment (sec. 105) speaks of the "*administratively* autonomous metropolitan district". It is hard to conceive just what the resulting relationship is, but passing that, the undisputed testimony is that one of the prerogatives of the archbishop accredited by the Patriarch is to officiate at

[3] A minor error is the observation of appellee (its brief, p. 10), that the autocephaly of the Russian Church followed the fall of Constantinople to the Turks in 1453. Actually it dates from 1448 and resulted from the union of the Patriarchate of Constantinople with the Pope at the Conference of Florence in 1439. Constantinople accepted and recognized this autocephaly. (Proceeding of Conference *supra*, pp. 10-13; 3 Encyclopedia Brittanica 168.)

services therein, to sit in the Bishops seat. It is conceded that if appellee prevails, Metropolitan Theophilus and not Metropolitan Benjamin, will conduct services in the Cathedral. Such use is not "administrative" in any sense, but purely "ecclesiastical", a use which, on its own theory, the metropolitan district cannot rightfully withhold from the Patriarchal archbishop. One may not profess to nourish the spirit and take away the house in which the spirit dwells. This is a dilemma inherent in the untenable position of the metropolitan district from which it cannot extricate itself. Furthermore, the Cathedral was never subject to the "administrative" control of the American Archdiocese but only to the "ecclesiastical" jurisdiction of the Holy Synod, then the Patriarch.

6. Legal Concepts and Ecclesiastical Relations

The ecclesiastical facts and the canon law should control the disposition of this case and the legal concepts of "trusties" and "beneficiaries," heavily laden with overtones of the civil law, should not be used to displace the canon law. The confusion resulting from the use of such inapposite concepts is revealed by Judge Conway's opinion. Thus, after asserting at the very outset that the cathedral was "dedicated to the use of all the members of the diocese," he states that "it is our duty in this action to identify the true and proper beneficiaries at the present time of such dedication of the cathedral" (253). If the cathedral was so dedicated that duty was discharged before its commencement and the rest of the opinion is an elaborate tautology. Later, Judge Conway considers that it was his duty to ascertain, not the "beneficiaries", but the "trustees" who could be relied on to administer "more faithfully" the cathedral trust (274). As a result, he transmutes the archbishop, Metropolitan Benjamin, into an involuntary "trustee" subject to removal—notwithstanding that he doesn't have "title". Such considera-

tions and concepts, we submit, are wholly foreign to the case. The relation between the Patriarch, his appointed archbishop, St. Nicholas Cathedral and the worshippers of the diocese, are to be stated solely in terms of church government and canon law, i.e., the cathedral is subject to the ecclesiastical jurisdiction of the Patriarch and, under canon law, may be occupied only by his appointed archbishop.

7. The Sobor of 1923—Secession—and Speeches

We fail to see the materiality of the extended discussion appellee devotes to these subjects. What happened in 1923 is hardly relevant now (163-164). Appellee says that the Renovated Church "is extinct today" (its brief, p. 13). Its failure attests to the vitality of the Patriarchal Church. Metropolitan Benjamin does not derive his authority as archbishop from the Sobor of 1923 but from his appointment by the Patriarch.

8. Free Exercise of Religion is the Issue

The issue here is not the right of possesion of a piece of realty or a business property, subject to local law, but the right to an *ecclesiastical* and *religious* use, required by canon law and nullified by civil command. The majority below did not decide the case on the basis of any rule of real property law or ejectment; they expressly ruled on appellants' rights under the First Amendment (298). They ruled that the civil power could and did enter this religious controversy and decided that, notwithstanding the canon law, a local group of churches should have the ecclesiastical use of the cathedral instead of the central church which, by custom and canon law, had the ecclesiastical use prior to the statute and from the origin of the cathedral. Thus, they defined the issue to be whether "Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the Archbishop of the North

American Metropolitan District, was the proper person * * * or the proper trustee" who would "more faithfully" administer the Cathedral (274) and they found or read into the statute a legislative "determination" that the metropolitan district was the more "faithful" trustee (281). Appellants contend, of course, that such action by the legislature or the Courts is prohibited. The question is not which "trustee" is more "faithful" (the civil power cannot decide that issue), but what the canon law says. Occupancy of the Cathedral by the appointed archbishop—to officiate there and sit in the Bishop's seat—is an exercise of religion and a statute that forbids this must fall before the First Amendment.

9. *Watson* v. *Jones*

(a) The rule that matters of "church discipline" and "ecclesiastical government" are not subject to civil jurisdiction (p. 733) and that the decisions of the chief authorities of a church respecting any matters of church "law", "discipline" or "government" (727) are "final" and "conclusive", necessarily stems from the constitutional principle of separation of church and state. If the civil authority has the power to disregard the rules of church government and discipline, and impose on a church other rules, the civil power prohibits the "free exercise" of religion in accordance with the dicipline of the church.

(b) *Watson* v. *Jones*, without disturbing the marshal's possession, enjoined interference with the *ecclesiastical* functions of the plaintiff, as *pastor* of the church and declared that the trustees of the incorporated church were only the nominal holders—actually the custodians—of the legal title, and, in the use of the church for *ecclesiastical* purposes, the trustees were subject to the supreme church authorities (at 720-1). To the same effect is *Trustees of Presbytery* v. *Westminister Church*, 305 N. Y. 222, where the Court permitted a seceding corporate church to retain

its "naked" title but required it to hold the church subject to the "discipline and laws" of the Presbyterian Church at large (at 321).

(c) When the original corporation was organized in 1899, of which the Russian Ambassador and the Consul General were the trustees, and when the Cathedral was consecrated in 1905, it became subject to the denominational control of the "ecclesiatical governing body" to which the corporation was subject (Rel. Corps. L. Sec. 5), *i.e.*, the Holy Synod, and later the Patriarch. (This would have been the case in any event under canon law.) The trustees were thereafter powerless to withdraw the Cathedral from this juriadiction.

Appellee's contention in Point II (its brief, pp. 86-96), is based on a fallacy. Assuming the state may or may not provide denominational control over corporations, it does not follow that the state may take a church subject to one ecclesiastical jurisdiction and transfer it to another. That is what the statute does here.

The fact that the record title is now held by a corporation is a fortuitous circumstance and should not affect the merits of the case. The ecclesiastical issue would be the same, if the title were in an individual, such as the archbishop, as it was during 1916 and 1917.

(d) It is true that in a particular case a Court determines whether a particular church is subject to this or that denomination. But in such a case the Court does not determine who is the better or more faithful trustee, but applies the canon law as determined by the chief authorities of the church. This is what this Court did in *Watson* v. *Jones*. This is required by the separation principle. Application of a rule contrary to canon law would violate the separation principle. That same principle bars statutory nullification of the canon law.

10. The Alleged Demand for a Pledge of Loyalty

On page 33 of its brief, appellee says: "*'Loyalty' to the Soviet government was required by Metropolitan Sergius from all of the clergy abroad* (R. 113-114).. By 'loyalty' was meant refraining from criticism of the Soviet regime either in the pulpit or in the name of the church" (italics in original). This limitation renders unfair and misleading the use of the term "loyalty" to describe the policy of the Patriarch. Appellants protested against such abuse of terms (122-123):

> "Excuse me. There is no evidence there was any pledge of loyalty. It is a question of agitation in the churches against the government.
>
> Mr. Arkush: When I say a 'pledge of loyalty' I mean that pledge which his Eminence has testified to.
>
> A. Loyalty is understood as refraining from politics only * * *. Both in the church and in the name of the church".[4]

Nevertheless, appellee's brief asserts with repetitive emphasis that there was a demand of loyalty to the Soviet government without indicating, except in rare instances, the limitation noted above.

In our main brief (pp. 12, 30-33) we have shown that the evidence does not sustain appellee's claim.

The pronouncement of Metropolitan Sergius in 1927 (207-208), the proffer of settlement in 1945 by Patriarch Alexy (227-228), the testimony of Metropolitan Benjamin (112-126), the testimony of Metropolitan Gregory that the church "is functioning freely as an orthodox church, without interference by the civil authorities" (167), the

[4] The foregoing, in our view, epitomizes Metropolitan Benjamin's testimony (112-126), which does not sustain appellee's claim that he demanded that the local clergy pledge loyalty to the Soviet government (its brief, p. 35).

statement by the Patriarch in 1943 that the Patriarchal Church "has kept unsullied its canonical consciousness * * * and it correct and canonical supreme direction" (102-103), the acceptance of this truth by the canonical experts of the metropolitan district (242-247), the resolution of the membership of the metropolitan district in 1946 to request the Patriarch "to continue us in his fold and be our spiritual head" (222), the admonition of the metropolitan district to its clergy "not to touch upon political questions * * * especially from the pulpit" (216)—all this shows that there was no demand for a pledge of "loyalty" to the Soviet government, that the policy of keeping the local church here, *qua* church, "in church and in the name of the church", out of politics, was not a bar to reunion, and that the negotiations for a setlement foundered, not on the spurious issue of "loyalty" but, as the Appellate Division found, on the purely ecclesiastical question as to the scope of the patriarchal power to confirm locally elected bishops (276 App. Div. 319-320). The metropolitan district sought to withhold from the Patriarch what is had readily given to the Karlovitz Synod.

The loyalty issue is a red herring.

11. Presumptions Unlimited

Although presumptions have no value in an issue such as this, appellee's fundamental position is based on a network of presumptions, none of which has any basis in fact, namely, the presumption that the statutes made findings that the Patriarch is a tool of the Soviet government, that there was a "likelihood" that the local churches might be used for Soviet propoganda, that the metropolitan district is identical with the American Archdiocese, that the churches which did not participate in the Detroit convention nevertheless consented to the autonomy, that the metropolitan district was the proper "trustee" who could administer "more faithfully" than the Patriarch the local Russian Churches.

There is nothing whatever to show that the legislature had any of these things in mind. They are constructions of counsel's mind.

12. The Post-Statute and Extra-Record Material Used by Appellee

Appellee incorporates in Appendix C of its brief some material which appeared in the Journal of the Patriarchate from March to December, 1950. It acknowledges the incongruity of claiming that a statute, passed in 1945, was based upon or was influenced by something published five years later. It nevertheless seeks to justify its use by the claim that, if we are to "presume" that the statute made a "finding" that there was a "likelihood" that the local Russian churches would be used as instruments of Soviet propaganda, then this material lends confirmation to this presumed and prophetic finding (its brief, pp. 76-77). With respect to the *legal* effect this material should have, we observe:

(a) The pronouncements of the Patriarch, like those of the Pope, are binding on the faithful only when they deal with matters of faith (and perhaps morals) when uttered *ex-Cathedra*. All other utterances—and those appearing in Appendix C fall within this category—do not bind the faithful. An Orthodox Christian may differ with his Patriarch on matters of politics, economics, etc.

(b) No evidence of any kind has been offered that the Patriarchal Church in New York or any of its local clergy or members have said or done anything in obedience to or conformity with the views set forth in Appendix C.

(c) The views of the Patriarch or the editors of the Journal, however erroneous they may be and however unacceptable they are here, do not furnish constitutional justification for the suppression of the Patriarchal Church, particularly its *incorporated* churches established *prior*

to 1924. The state cannot punish a local branch of an international Christian society because it disagrees with the political views of the head of the Church. For the same reason the State of New York could not have punished the metropolitan district because, during the war and up to 1946, it had been subject to the jurisdiction of the Karlovitz Synod, which had been compromised with Hitler.

Often a Church, to protect its long range interests, may find it necessary to operate on the principle of the lesser evil. Professor Timasheff, *supra*, suggests that certain actions of the Patriarchate may be explained on that ground (191). To an unfriendly eye a Church may sometime appear to be nearer earth than heaven. But criticism may well be hasty and premature. Even if the state take an uncharitable view of the actions of a church at a given time, nevertheless, unless there be clear and present danger to the safety of the state, the free exercise of religion by that Church, its ecclesiastics and members, may not be prohibited or abridged.

13. The State, the Church and Religion

The Tudor state not only established the Anglican Church but determined its internal government, appointed its bishops, convened its religious assemblies, fixed its creed, compelled attendance at its church, enacted compulsory tithes, prohibited all non-conformity, outlawed the jurisdiction of the Pope and made any ecclesiastical deviation a civil offense. The individual had to adopt the religion and the church of the sovereign; *cujus regio, ejus religio*, was the principle. (Butt, *The American Tradition in Religion and Education* (1950), pp. 14-15; Greene, *Religion and the State* (1941), pp. 1-23.)

The same or similar religious practices were transplanted to the early colonies. In Virginia the Anglican Church was established; in Massachusetts the Puritans founded their Bible Society along Calvinistic theocratic

lines. The other colonies varied in their religious practices between these two extremes, except Rhode Island, which was founded as "a shelter for persons distressed for conscience." (Greene, *supra*, pp. 23-47; Butts, *supra*, pp. 15-20.)

The First Amendment repudiated the theory and practice of the state-church relationship of the Tudor Leviathan state. Religion and its exercise was a matter of *personal*, not state concern. Churches, their government and their ecclesiastical affiliations, were beyond the reach of the civil power. A church was an autonomous voluntary society which government could not control. Church and religion were a sanctuary which the state could not enter.

The vice of the statute, as construed and applied here, is that it resurrects the power of the state over churches and religion, exercised by the Tudor state in the past and by the totalitarian states at the present time. Fear of Catholicism prompted the suppression of the Catholic Church in Tudor England, fear of democracy prompts the totalitarians of today to suppress churches having western affiliations, and the "likelihood" of Soviet propaganda is offered here as justification for the suppression of the Patriarchal Church—or an insignificant segment of it. But a society such as ours, living under the First Amendment, cannot emulate the totalitarians. It is one of the tragedies of our times that the totalitarian states do not have a Bill of Rights such as we have.

The Orthodox Church, like the Roman Catholic Church, is by its nature a universal society and transcends national boundaries. Under the First Amendment the state has no power to break up into local units—to domesticate—such an international religious society.

It would *not* be a national misfortune, as appellee somewhat heatedly puts it (its brief, p. 5), if this single building, this consecrated cathedral, were to remain in the

raditional jurisdiction of the Patriarch, but, we submit, would be a misfortune if, in order to take this Cathedral ut of his hands, the First Amendment should be sacrificed.

The judgment should be reversed.

Respectfully submitted,

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